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CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — EQUAL PROTECTION — PROSECUTORIAL DISCRETION — SELECTIVE PROSECUTION — The United States Supreme Court held that evidence tending to show different treatment of similarly situated individuals is required to obtain discovery in support of a selective prosecution claim.

United States v. Armstrong, 116 S. Ct. 1480 (1996).

From February to April of 1992, federal agents penetrated a suspected drug trafficking ring through the use of informants.[1] On several occasions, the informants bought crack cocaine from the defendants, who are African-American, and observed them carrying firearms.[2] The federal agents eventually searched the room in which the drug sales were conducted and arrested the defendants.[3]

In April of 1992, the defendants were indicted for drug-trafficking and firearm violations.[4] In response to the charges, defendants filed a motion for pre-trial discovery, or in the alternative, a motion for dismissal.[5] They based their motions on a claim of selective prosecution, stating that they were singled out for prosecution under the federal criminal statute because of their race.[6] To support a discovery motion in connection with their selective prosecution claim, the defendants submitted a single affidavit by an employee of the Federal Public Defender's Office which alleged that all individuals charged with the same offenses as the defendants were black.[7]

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1. United States v. Armstrong, 116 S. Ct. 1480, 1483 (1996).
2. *Armstrong*, 116 S. Ct. at 1483.
3. *Id.*
4. *Id.* Specifically, respondents were indicted on charges of: a) conspiring to possess with intent to distribute more than fifty grams of crack cocaine; b) conspiring to distribute the crack cocaine under 21 U.S.C. §§ 841 and 846 (1988 & Supp. IV); and c) using firearms in connection with drug-trafficking. *Id.*
5. *Id.*
6. *Id.* Selective prosecution is the exercise of prosecutorial discretion when enforcing criminal laws that are either discriminatory on their face, motivated by a discriminatory purpose or have a discriminatory effect. *John E. Nowak & Ronald D. Rotunda, Constitutional Law*, § 16.49 (5th ed. 1995).
7. *Armstrong*, 116 S. Ct. at 1483. The affidavit alleged that the defendants were black in all twenty-four crack cocaine cases handled by the Public Defender's Office. *Id.*

Despite the Government's opposition, the district court granted the discovery motion.[8] The Government sought reconsideration of the court's ruling,[9] claiming that race was not a factor in the criminal investigation or prosecution decisions.[10] To rebut the Government's position, one of the defense attorneys submitted an affidavit stating that an intake coordinator at a drug user rehabilitation center alleged there is generally no difference between the number of caucasian and minority drug users and dealers.[11] The defendants then illustrated that even though the number of drug offenders was equally diffused between white and black individuals, only the black offenders were charged with federal crimes, while the white offenders were charged with state offenses.[12]

The district court judge denied the Government's request for reconsideration and later dismissed the case due to the Government's refusal to comply with the discovery order.[13] On appeal, a split three-judge panel from the Court of Appeals for the Ninth Circuit reversed the district court's ruling.[14] The court held that the defendants did not successfully establish that other nonblack but similarly situated defendants had not been prosecuted.[15]

The Court of Appeals subsequently reheard the Government's appeal *en banc*, and as a result, overruled its prior decision and affirmed the district court's order of dismissal.[16] On rehearing,

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8. *Id.* at 1484. The court ordered the Government to do the following: (1) provide a list of all cases from the last three years in which the Government charged individuals with cocaine and firearms offenses; (2) identify the race of the defendants in those cases; (3) identify what levels of law enforcement were involved in the investigations of those cases; and (4) explain its criteria for deciding to prosecute those defendants for federal cocaine offenses. *Id.*

9. *Id.*

10. *Id.* To further its position, the Government stated that: (1) there was over one hundred grams of crack found on the defendants in this case, which is over twice the threshold limit for a federal mandatory minimum sentence of ten years; (2) there were multiple sales and firearms violations involving the numerous defendants; (3) the evidence was strong and included both audio and video tapes of the drug sales; and (4) several of the defendants had criminal histories. *Id.* In addition, the Government submitted a report indicating that large scale, interstate crack cocaine manufacturing, distribution and trafficking networks were controlled by Jamaicans, Haitians and Black street gangs. *Id.*

11. *Id.*

12. *Armstrong*, 116 S. Ct. at 1484. Defendants submitted an affidavit from a criminal defense attorney alleging that many nonblacks are prosecuted in state court on crimes involving possession and distribution of crack. *Id.* The penalties for these crimes in state court are considerably lighter. *Id.* at 1493 n.5.

13. *Id.* at 1484.

14. *Id.*

15. *Id.* at 1484. The appellate court held that the defendants must provide a "colorable basis" for believing their claim of selective prosecution before discovery may be obtained. *Id.*

16. *Id.* at 1484-85.

the court held that a defendant is not required to show that the government did not prosecute others similarly situated under a claim of selective prosecution.[17] The defendants then filed a writ of certiorari with the United States Supreme Court, which was granted so that the Court could determine the appropriate standard for discovery in selective prosecution cases.[18]

The Supreme Court began its analysis by discussing Federal Rule of Criminal Procedure 16.[19] Defendants had argued that Rule 16, which provides for discovery of documents within the Government's possession material to the preparation of a defendant's defense, mandates that documents pertaining to each and every claim or defense possibly resulting in the defendants' acquittal be revealed.[20] The Court rejected this argument, however, holding that Rule 16 authorizes the defendants to examine documents related only to their defense against the Government's case-in-chief and not to their claim for selective prosecution.[21]

The Court then discussed the standard for proving and obtaining discovery in selective prosecution cases.[22] Assuming that discovery is allowed for selective prosecution claims if the claimants produce the required quantum of evidence supporting

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17. *Armstrong*, 116 S. Ct. at 1484-85.

18. *Id.* at 1485.

19. *Id.* *See* FED. R. CRIM. P. 16(a)(1)(c) (1994 & Supp. 1997). Rule 16 provides, in pertinent part:

> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

FED. R. CRIM. P. 16(a)(1)(C) (1994 & Supp. 1997).

20. *Armstrong,* 116 S. Ct. at 1485.

21. *Id.* The Court explained the concept of a "defense" generally includes any claim that may be used as a "sword" to challenge the "prosecution's conduct of the case." *Id.* The Court then described a second, narrower class of claims as "shield" claims. *Id.* Shield claims refute the prosecution's claim that the defendants committed the acts as charged. *Id.* The Court found that Rule 16 supports the latter reading because of a "perceptible symmetry" between documents material to preparing a defendant's defense and documents intended for Government use as evidence for trial. *Id.* The Court drew this conclusion from the language in Rule 16(a)(1)(C) and Rule 16(a)(2). *Id.* *See* FED. R. CRIM. P. 16(a)(2) (1996). The Court reasoned that if the defendants' reading of Rule 16(a)(1)(C), which includes selective prosecution in the concept of "defense," was accepted, the defendants could discover Government work product from every other prosecution except work product created for their own case. *Armstrong*, 116 S. Ct. at 1485.

22. *Armstrong*, 116 S. Ct. at 1485. The Court noted that a selective prosecution claim is an independent assertion rather than a defense aimed at the merits of the crime charged. *Id.* at 1486. A selective prosecution claim asserts that the Government has brought the charges against the defendant for reasons prohibited by the United States Constitution. *Id.*

the claims,[23] the Court characterized the standard for proving prosecutorial irregularity as very high.[24] According to the Court, the claimants must show that the prosecution's policy "had a discriminatory effect and . . . was motivated by a discriminatory purpose."[25]

The Court noted that in order to demonstrate a discriminatory effect in a race case, a claimant must present evidence indicating that the government did not charge or try similarly situated individuals with different racial identities.[26] Contrary to the defendants' position,[27] the Court found a mere allegation that members of only the defendants' race were prosecuted, without a showing that members of other races engaging in similar activity were not prosecuted, is insufficient.[28]

Finally, the Court discussed how to obtain discovery in support of a selective prosecution claim.[29] The Court first noted that since discovery in a selective prosecution claim is costly and exposes the law enforcement tactic employed by the Government,

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23. *Id.* at 1485-86. The Court noted that the executive branch has the responsibility of law enforcement and such responsibility entails using broad discretion in determining which cases to prosecute. *Id.* at 1486. Such discretion is accompanied by a presumption of regularity that can only be overcome by clear evidence to the contrary. *Id.* This discretion is, however, subject to constitutional constraints, including the equal protection guarantee under the Fifth Amendment. *Id.*

24. *Id.* The Court stated that entertaining such a claim means exercising judicial power over the executive branch. *Id.*

25. *Id.* at 1487.

26. *Id.*

27. *Armstrong*, 116 S. Ct. at 1487. In support of their position that the defendants are not required to show that similarly situated persons have not been prosecuted, respondents cited *Batson v. Kentucky,* 476 U.S. 79 (1986) and *Hunter v. Underwood,* 471 U.S. 222 (1982). *Armstrong,* 116 S. Ct. at 1487. In *Hunter*, one black and one white person challenged the constitutionality of a provision of the Alabama Constitution disenfranchising offenders convicted of crimes of moral turpitude. *Hunter,* 105 S. Ct. at 1918. The evidence illustrated that the crimes involved were largely committed by black persons, and that the intent of the 1901 Convention that adopted the provision was motivated by disenfranchising blacks persons. *Id.* at 1919-22. The Supreme Court held in *Hunter* that this Alabama constitutional provision violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 1922.

In *Batson*, the petitioner, a black man, was indicted on charges of burglary and receipt of stolen goods. *Batson*, 106 S. Ct. at 1715. On *voir dire*, the prosecutor exercised all four peremptory challenges to exclude four black jurors from the jury. *Id.* The Supreme Court held that once the defendant establishes a *prima facie* case of discrimination in selection of a jury, consisting of: (1) showing the defendant is a member of a cognizable racial group; (2) illustrating the fact that peremptory challenges are inherently susceptible to discrimination; and (3) proving that these facts with other relevant fact raise an inference of discrimination, the burden shifts to the prosecution to provide a neutral explanation of its peremptory challenges. *Id.* at 1723. The Court then held that if the prosecutor does not come forward with a neutral explanation on remand of the case, the petitioners convictions must be reversed. *Id.* at 1725.

28. *Armstrong*, 116 S. Ct. at 1487.

29. *Id.* at 1488-89.

the standard for obtaining discovery for such a claim should correspond with the high standard for proving a selective prosecution claim.[30] The Court then stated that the vast majority of appellate courts require some evidence indicating that while the government could have prosecuted similarly situated defendants of other races, it did not.[31] In conclusion, the Court found the standard for obtaining discovery in a selective prosecution claim to be "a credible showing of different treatment of similarly situated persons."[32] This standard, noted the Court, adequately protects the defendant from selective prosecution and aids the Government in protecting the public from crime.[33] The Court then held that in this case, the defendants' evidence did not constitute a sufficient showing of different treatment.[34] As a result, the Supreme Court reversed the decision of the court of appeals and remanded the case for further proceedings consistent with its opinion.[35]

Justice Breyer wrote a separate opinion in *Armstrong* concurring with the majority decision in part.[36] Justice Breyer noted that he did not agree with the Court, however, as to whether a defendant can request inspection of only those documents material to his or her defense against the Government's case-in-chief under Federal Rule of Criminal Procedure 16.[37] According to Justice Breyer, this reading of Rule 16 limits the rule's intended application.[38] Justice Breyer reads the rule to categorize all of the materials that the Government is required to produce.[39]

In response to the majority's argument regarding the work-product exception to Rule 16 which requires the Government to produce documents,[40] Justice Breyer thought that the work-product exception ought to have exceptions of its own, including a credible claim of selective prosecution.[41] Justice Breyer also

30. *Id.* at 1488.
31. *Id.*
32. *Id.* at 1489.
33. *Armstrong*, 116 S. Ct. at 1489.
34. *Id.* The Court noted that the study proffered by defendants failed to show that individuals of other races could have been prosecuted yet were not. *Id.* The Court noted that a newspaper article discussing discrimination in federal sentencing laws was not relevant to a discrimination allegation with respect to the decision to prosecute, the affidavits submitted by defendants contained hearsay, and the defense attorney's personal conclusions were drawn from statements of a party not participating in the proceedings. *Id.*
35. *Id.*
36. *Id.* at 1489-92.
37. *Id.* at 1489.
38. *Armstrong,* 116 S. Ct. at 1491.
39. *Id.* at 1490.
40. FED. R. CRIM. P. 16(a)(2) (1996).
41. *Armstrong*, 116 S. Ct. at 1491.

believed, however, that the defendants in this case did not make the threshold showing necessary to obtain discovery for their selective prosecution claims.[42]

Justice Stevens' dissenting opinion focused on why discovery was appropriate in this case.[43] He specifically pointed out that three factors justified close vigilance over the prosecution by the federal judiciary in this case: (1) the extremely high penalties for federal crimes involving possession and distribution of crack cocaine as compared to crimes involving powder cocaine;[44] (2) the absence of disparity between penalties for crimes involving crack cocaine and powder cocaine at the state level;[45] and (3) the burden of stricter federal penalties for crack cocaine offenses, which falls almost entirely on blacks.[46]

Justice Stevens' opinion also discussed the authority of district court judges to order discovery for selective prosecution claims.[47] He agreed with the majority that Rule 16 does not provide courts with the authority for ordering discovery in such cases.[48] Justice Stevens also found that the evidence submitted by the defendants in this case in support of their selective prosecution discovery request was insufficient to give them a right to discovery.[49] Notwithstanding this, however, Justice Stevens stated that district court judges have inherent judicial powers allowing them to order such discovery.[50] These powers, he believes, stem from two factors: (1) the responsibility of the prosecutor, as a member of the bar, to uphold the rules of professional conduct in executing

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42. *Id.* at 1491-92.

43. *Id.* at 1492-95.

44. *Id.* at 1492. Justice Stevens pointed out that the crime of possessing or distributing one gram of crack cocaine is treated the same as the crime of possessing or distributing one hundred grams of powder cocaine. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (1995)). He then stated that such treatment has resulted in sentences for crack cocaine to be three to eight times longer than sentences for comparable offenses involving powder cocaine. *Id.* at 1492-93.

45. *Id.* at 1493. Most states make no distinction in sentencing based on whether a crime involves crack or powder cocaine. *Id.* (citing United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 145 (Feb 1995) [hereinafter Special Report]). The states that do distinguish in sentencing do not establish as stark a differential as does the federal government. *Id.* (citing Special Report at 129-38).

46. *Armstrong*, 116 S. Ct. at 1493. Justice Stevens points out that while 65% of persons who used crack cocaine in 1993 were white, they represented only 4% of the federal offenders convicted of trafficking in crack cocaine. *Id.* (citing Special Report at 39, 161). At the same time, 88% of such defendants were black. *Id.* (citing Special Report at 39, 161). In addition, the Justice noted that black persons on average received sentences over 40% longer than whites. *Id.* (citing Special Report at 163).

47. *Id.* at 1492.

48. *Id.*

49. *Id.*

50. *Id.*

his or her public duties; and (2) the district court judges' unique position in enforcing this responsibility.[51] Justice Stevens then found that the facts contained in the defendants' evidence in this case were "sufficiently disturbing"[52] and thus a basis upon which the district court judge, in the exercise of her sound discretion, was authorized to order the Government to produce relevant documents in response to the selective prosecution claim.[53] According to Justice Stevens, therefore, the district court judge neither exceeded her power nor abused her discretion by ordering the discovery.[54]

Selective prosecution jurisprudencea arose with the seminal case of *Yick Wo v. Hopkins*,[55] decided in 1886.[56] In *Yick Wo*, the United States Supreme Court addressed the constitutionality of a San Francisco ordinance requiring operators of laundries in wooden buildings to obtain a permit from the board of supervisors.[57] In that case, the petitioners, natives of China, were imprisoned because they operated laundries in wooden buildings without obtaining the consent of the Board of Supervisors of San Francisco.[58] Under the ordinances, the Board of Supervisors had absolute discretion to grant or deny the permit.[59]

The petitioners contended that the ordinances were void on their face under the Fourteenth Amendment to the United States Constitution, or, in the alternative, void due to their racially biased enforcement as between similarly situated laundry operators.[60] The petitioners in *Yick Wo* alleged and established that two hundred other applicants of Chinese nationality had also been denied such permits upon application, while eighty nonChinese laundry operators were granted permits.[61]

The Supreme Court of California upheld the convictions.[62] The United States Supreme Court then granted certiorari in the

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51. *Armstrong*, 116 S. Ct. at 1492.

52. *Id.* at 1495.

53. *Id.*

54. *Id.*

55. 6 S. Ct. 1064 (1886). Since *Yick Wo*, selective prosecution has apparently been continuously treated as a denial of equal protection under the law. *See Armstrong*, 116 S. Ct. at 1487. The Supreme Court in *Armstrong* declared that a selective prosecution claim is to be analyzed under the general standards for equal protection. *Armstrong*, 116 S. Ct. at 1487.

56. *Yick Wo*, 6 S. Ct. at 1064.

57. *Id.* at 1066-73.

58. *Id.* at 1066.

59. *Id.* at 1065, 1068-69.

60. *Id.* at 1070-71.

61. *Yick Wo*, 6 S. Ct. at 1073.

62. *Id.* at 1066.

case.[63] Upon hearing the case, the Supreme Court pointed out that all of the conditions contained in the ordinances had been complied with by the permit applicants.[64] The Court then noted that while similarly situated individuals were granted permits, Yick Wo's permit application was denied without reason.[65] According to the Court, this was sufficient proof of impermissible discrimination.[66] Since no explanation for this discrimination was provided except for open hostility to race and nationality, the Court found the convictions in this case in violation of the Equal Protection Clause of the Fourteenth Amendment.[67]

In 1905, the requirement of showing similarly situated persons had not been prosecuted for similar criminal offenses under a claim of selective prosecution was reiterated in the case of *Ah Sin v. Wittman*.[68] In that case, Ah Sin petitioned for a writ of habeas corpus, seeking release from incarceration for violating a San Francisco ordinance prohibiting the set up and display of gambling tables and gambling paraphernalia in barricaded rooms.[69] Ah Sin alleged that the ordinance under which he was prosecuted was enforced only against persons of Chinese origin.[70] At trial, Ah Sin's claims were rejected.[71] Upon petition for a writ of habeas corpus, the Superior Court for the City and County of San Francisco affirmed the decision of the police court and dismissed the writ.[72]

The United States Supreme Court granted certiorari in the case and affirmed the judgment of the Superior Court, rejecting the petitioner's contentions that enforcement of the gambling ordinance against Chinese persons constituted a denial of equal protection in violation of the Fourteenth Amendment to the Constitution.[73] The Supreme Court based its holding on the failure of the petitioner to allege either that the conduct criminalized by the gambling ordinance also occurred among the nonChinese

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63. *Id.*

64. *Id.*

65. *Id.* In *Yick Wo*, the second prong of the modern test, discriminatory purpose, seems to have been inferred from statistical and other extrinsic evidence of disproportionate impact. *Id.* The state showed no other reason for disparate impact of the ordinance's administration. *Id.* In effect, the burden of proof seems to have shifted to the state to demonstrate that it was motivated by permissible criteria. *Id.*

66. *Yick Wo*, 6 S. Ct. at 1073.

67. *Id.*

68. 25 S. Ct. 756 (1905).

69. *Ah Sin*, 25 S. Ct. at 757.

70. *Id.*

71. *Id.* at 757.

72. *Id.* at 757-58.

73. *Id.* at 758-59.

population, or that there were nonChinese offenders against whom the ordinance was not enforced.[74]

The 1944 case of *Snowden v. Hughes*[75] produced two new aspects with respect to a claim of selective prosecution that can be found in the modern analysis of such claims as presented in *Armstrong*.[76] The first aspect is the discriminatory intent element that must be found with respect to the discriminatory application of the law.[77] The second aspect is the existence of permissible and impermissible classifications of persons to whom the law is applied.[78]

In *Snowden*, the Supreme Court faced the issue whether a State Primary Canvassing Board violated the Privileges and Immunities Clause and Equal Protection Clause of the Fourteenth Amendment by failing to nominate a second candidate for state representative in accordance with Illinois law.[79] Pursuant to the Illinois statute, the Canvassing Board had a duty to nominate two Republican and one Democratic candidate for election for state representative.[80] The plaintiff in the case received the second highest number in the Republican primaries.[81] The plaintiff alleged, however, that the Canvassing Board "wilfully, maliciously and arbitrarily" refused to nominate him, thus depriving him of being elected for state representative since nomination and certification by the Board was tantamount to election.[82] The complaint asserted that the Canvasing Board's failure to nominate him violated his rights protected by the Privileges and

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74. *Ah Sin*, 25 S. Ct. at 759. At the time *Ah Sin* was decided, the Supreme Court apparently considered the ordinance to be discriminatory on its face if it regulated "conditions and practices" existing only among Chinese persons, or *de facto* discriminatory if there were others similarly situated and not prosecuted under the gambling ordinance. *Id.* Selective prosecution or selective enforcement is distinguished from a discriminatory law. *See Yick Wo*, 6 S. Ct. at 1070-71. In selective prosecution, the law is usually fair and nondiscriminatory on its face, but the administration or enforcement of the law is discriminatory. *See id.* at 1070-73. Notably, in both *Yick Wo* and *Ah Sin*, the Supreme Court was ready to accept evidence of "disparate impact" or what shall later become "discriminatory effect," without more, as evidence of a discriminatory intent. *Ah Sin*, 25 S. Ct. at 759 (citing *Yick Wo*, 6 S. Ct. at 1073). Although the language in *Yick Wo* and *Ah Sin* may point to a discriminatory design, neither of the two cases articulate the discriminatory intent as a separate element in order to have the state action invalidated. *See Ah Sin*, 25 S. Ct. at 756; *Yick Wo*, 6 S. Ct. at 1064. This additional element, discriminatory intent, or discriminatory purpose in the administration of laws, was introduced by the case *Snowden v. Hughes*, 64 S. Ct. 397 (1944).

75. 64 S. Ct. 397 (1944).

76. *Armstrong*, 116 S. Ct. at 1486-87.

77. *Snowden*, 64 S. Ct. at 401.

78. *Id.*

79. *Id.* at 398-99.

80. *Id.*

81. *Id.* at 399.

82. *Snowden*, 64 S. Ct. at 399.

Immunities Clause and the Equal Protection Clause of the Fourteenth Amendment.[83]

The district court dismissed the action and held that the allegations did not show a right protected by the United States Constitution or the laws of United States to be violated.[84] Additionally, the court found that the failure of the Canvassing Board to nominate the complainant did not constitute state action.[85] On appeal, the Court of Appeals affirmed the district court's ruling.[86]

The United States Supreme Court subsequently affirmed the district court's decision, stating that the Privileges and Immunities Clause does not protect rights pertaining to state citizenship and established by state law.[87] As to the equal protection claim, the Court stated that the statute in question required classification between a successful and an unsuccessful candidate, and held such classification permissible.[88] Continuing, the Court stated that an official action taken pursuant to this legitimate statute was not necessarily a denial of equal protection unless it was completed with an intent or purpose to impermissiblly discriminate.[89] The Court stated that to show such impermissible discrimination, one must show, as the plaintiff here did not, the intent to discriminate either on the face of the classification or through extrinsic evidence of discriminatory design or intentional and purposeful discrimination.[90]

The modern decision of *Oyler v. Boles*[91] stands as a further refinement of the requirements for proving impermissible discrimination. In *Oyler*, the petitioners were sentenced to life imprisonment under a West Virginia habitual offender statute.[92] Petitioner Oyler subsequently filed for a writ of habeas corpus, alleging that he was denied procedural due process and equal protection under the Fourteenth Amendment because he was discriminatorily selected for life imprisonment.[93] Specifically, Oyler alleged that the West Virginia habitual offender statute

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83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Snowden*, 64 S. Ct. at 400.
88. *Id.* at 401.
89. *Id.*
90. *Id.* at 401.
91. 82 S. Ct. 501 (1962).
92. *Oyler*, 82 S. Ct. at 502. The West Virginia habitual offender statute provided for a mandatory life sentence upon the third conviction of a crime punishable by confinement in a penitentiary. *Id.* (citing W. VA. CODE § 6130 (1961)).
93. *Id.*

was applied without advance notice and only as to a minority of persons subject to its provisions.[94]

In support of his contention, Oyler alleged that while there were six men sentenced between 1940 and 1955 in the county court who were subject to the mandatory habitual offender statute, only Oyler was sentenced to life imprisonment.[95] In addition, Oyler stated that although there were nine hundred and four other known offenders throughout the state of West Virginia subject to the mandatory sentencing statute, they were also not sentenced as habitual offenders.[96]

Upon hearing Oyler's claims, the United States Supreme Court rejected his allegations and found that the evidence merely proved that those not prosecuted under the habitual offender statute were treated differently because of the prosecutors' lack of knowledge as to their prior convictions.[97] Noting that the life sentence for habitual offenders must be proposed to the court after conviction, but before sentencing, the Court stated that the records submitted in support of the Oyler's petition may not have been available to the state when the prosecutor filed its cases.[98] According to the Court, this information could have been compiled later, during the subjects' incarceration.[99] The Court then explained that the "conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation."[100] In response to Oyler's assertion that imposing a life sentence upon him constituted selective prosecution, the Court stated that the selection must be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, none of which were alleged by Oyler.[101]

After *Oyler*, selective prosecution jurisprudence took a different turn. Courts began to accept evidence of disproportionate effect or disparate impact to prove or raise an inference of discriminatory intent or purpose.[102] In the cases of *United States v. Crowthers*,[103] *United States v. Steel*[104] and *United States v.*

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94. *Id.* at 502.
95. *Id.* at 505.
96. *Id.*
97. *Oyler*, 82 S. Ct. at 506.
98. *Id.* at 506.
99. *Id.*
100. *Id.*
101. *Id.* (citing Snowden v. Hughes, 64 S. Ct. 397 (1944); Yick Wo v. Hopkins, 6 S. Ct. 1064 (1886)).
102. *See* United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972); United States v. Steel, 461 F.2d 1148 (9th Cir. 1972); United States v. Falk, 479 F.2d 616 (7th Cir. 1973).
103. 456 F.2d 1074 (4th Cir. 1972). In *Crowthers*, the defendants conducted "Masses for Peace" in the concourse of the Pentagon in protest to the Vietnam war. *Crowthers*, 456 F.2d at 1076. They were arrested for creating loud and unusual noise and

Falk,[105] the defendants alleged that the Government prosecuted them for crimes while not prosecuting other similarly situated persons who committed the same offenses.[106] In these cases the Fourth, Ninth, and Seventh Circuit Courts of Appeal, respectively, accepted and allowed statistical and other extrinsic evidence showing discriminatory effect to establish a rebuttable inference that there was "invidious discrimination" or discriminatory intent on the part of the prosecution.[107] This inference served to shift the burden of proof to the Government to show that its actions were not invidiously motivated, but were based on legitimate and permissible policy considerations.[108]

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obstructing the Pentagon entrance. *Id.* at 1077-78. The defendants asserted selective prosecution and alleged that the Government allowed sixteen other assemblies to gather in the concourse while singling them out for prosecution because of the anti-war content of their assembly. *Id.* at 1078. The Fourth Circuit Court of Appeals stated that since the Government possessed evidence proving or disproving selective prosecution, it should produce evidence in rebuttal of the inference of selective prosecution. *Id.*

104. 461 F.2d 1148 (9th Cir. 1972). In *Steel*, the defendants had been ardent opponents of the population census. *Steel*, 461 F.2d at 1150-51. In defense to their prosecution for refusing to answer census questions, the defendants asserted a claim of selective prosecution. *Id.* In spite of the Government's refusal to produce evidence regarding census offenses, the defendants found six other offenders who had not been prosecuted. *Id.* at 1151-52. The six unprosecuted offenders, though, had not publicly opposed the census. *Id.* at 1152. In addition, the Government had created files on the defendants and not on any other offenders. *Id.* This evidence was sufficient to create an inference of selective prosecution and to shift the burden of proof to the Government to show that its actions were not motivated merely because of the defendants exercise of their First Amendment rights. *Id.*

105. 479 F.2d 616 (7th Cir. 1973). In *Falk*, Jeffrey Falk, a vocal protestor of the draft, was prosecuted for dispossessing his draft card. *Falk*, 479 F.2d at 617-18. Falk claimed that he was prosecuted merely because of his opposition to the draft and showed that twenty-five thousand other registrants also unlawfully disposed of their draft cards, but were not prosecuted. *Id.* at 621. Falk also proffered evidence to the effect that an assistant United States Attorney told Falk he was targeted because of his draft-counseling activities. *Id.* at 619-21. The Seventh Circuit Court of Appeals decided that there was sufficient evidence to show selective prosecution and required the Government to produce evidence to the contrary. *Id.* at 621.

106. *See Crowthers*, 456 F.2d at 1074; *Steel*, 461 F.2d at 1148; *Falk*, 479 F.2d at 616. Some scholars divide the analysis between cases dealing with selective prosecution in a racial setting and cases in a nonracial setting. *See Developments in the Law - Race and the Criminal Process*, 101 HARV. L. REV. 1520, 1537 (1988). But the courts, including the Supreme Court, generally do not distinguish selective prosecution claims according to whether they involve allegations of discrimination based upon race, religion, exercise of First Amendment rights or any other arbitrary classification. *See Armstrong*, 116 S. Ct. at 1487.

107. *See Crowthers*, 456 F.2d at 1075; *Steel*, 461 F.2d at 1148; *Falk*, 479 F.2d at 616.

108. *See Crowthers*, 456 F.2d at 1075; *Steel*, 461 F.2d at 1148; *Falk*, 479 F.2d at 616. In *United States v. Armstrong*, the Supreme Court used none of these cases to discern the elements of selective prosecution or to set the standard for allowing discovery against the Government. *See Armstrong*, 116 S. Ct. at 1485-89. The Supreme Court in *Armstrong* relied on the case of *United States v. Berrios*, 501 F.2d 1207 (2nd Cir. 1974), in which the Second Circuit laid down the formulaic two-prong test that has become the modern test to

Certain other courts, however, refused to allow evidence of discriminatory effect to raise an inference regarding the element of discriminatory intent for selective prosecution claims.[109] One such court was the Third Circuit Court of Appeals in *United States v. Berrigan*.[110] *Berrigan* involved the prosecution of Philip Berrigan and other inmates of the Lewisburg Federal Prison for smuggling letters in and out of the penitentiary.[111] In response to the prosecution, the defendants claimed that they were selected for prosecution for their outspoken opposition to the Vietnam war, in exercise of their constitutional rights, and not for the offenses charged.[112]

The defendants sought to obtain the prosecutors' testimony and Government documents related to the prosecution of their case.[113] The district court denied the defendants' request for discovery, stating that the defendants had failed to present evidence from which an inference as to the use of improper standards could be drawn.[114] The court found that by their requests for discovery, the defendants merely wanted to circumvent the established principle of judicial deference to the decisions of prosecutors in charging criminal offenders.[115] On appeal, the Third Circuit agreed with the district court and concluded that the appellants did not show a "colorable entitlement" or a "colorable basis" of "discriminatory prosecution" that would entitle the defendants to the discovery sought.[116]

The case of *United States v. Berrios*,[117] decided in 1974, further crystallized the elements required for a selective prosecution claim.[118] According to the Second Circuit Court of Appeals in *Berrios*, an individual with a selective prosecution claim must prove: (1) that others similarly situated have not generally been prosecuted for the conduct underlying the charge against the defendant; and (2) that the Government's discriminatory selection of the defendant for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race,

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prove selective prosecution as well as the standard for obtaining discovery. *Id.* at 1488-89 (citing *Berrios*, 501 F.2d at 1211).

109. *See* United States v. Berrigan, 482 F.2d 171 (3rd Cir. 1973); United States v. Berrios, 501 F.2d 1207 (2nd Cir. 1974).

110. 482 F.2d 171 (3d Cir. 1973).

111. *Berrigan*, 482 F.2d at 173.

112. *Id.*

113. *Id.* at 180.

114. *Id.* at 181.

115. *Id.*

116. *Berrigan*, 482 F.2d at 181. In reviewing the decision of the district court, the Third Circuit Court of Appeals employed the abuse of discretion standard of review. *Id.*

117. 501 F.2d 1207 (2nd Cir. 1974).

118. *Berrios*, 501 F.2d at 1211.

religion or the desire to prevent the exercise of constitutional rights.[119]

In *Berrios*, the defendants, Pablo Berrios and others, were prosecuted for holding a union office within five years after being convicted of arson.[120] Berrios claimed that he was selected for prosecution because of his support for Senator McGovern in the 1972 presidential elections and for his efforts to unionize the Marriott Restaurant Chain.[121] Berrios offered no evidence, however, showing that others similarly situated had not been prosecuted.[122] Nevertheless, Berrios posited that these allegations were sufficient for further inquiry into the evidence supporting his claim.[123]

The district court judge held the offer of proof that Berrios presented to be sufficient to show a prima facie case of selective prosecution.[124] The district court ordered the Government to produce an internal government memorandum for the court to determine which portions of the memorandum are confidential and to release the remainder to the defendants.[125] Upon the Government's refusal to comply with the order, the district court dismissed the case.[126]

On appeal by the Government, the Second Circuit held that the threshold showing for acquiring discovery in a case for selective prosecution was some evidence demonstrating the existence of the elements of selective prosecution in conjunction with a showing that the documents sought are probative of those elements.[127] Otherwise, the court continued, the Government could be subject to requests for discovery of evidence to which defendants are not normally entitled under the Federal Rules of Criminal Procedure based on a mere allegation of selective prosecution.[128] In conclusion, the court remanded and instructed

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119. *Id.* This case is also significant for its discussion of the discovery issues that are prompted by raising a claim of selective prosecution. *Id.* at 1210-12.

120. *Id.* at 1209. The defendant was prosecuted for violating the Labor Management and Disclosure Act of 1959, 28 U.S.C. § 504 (1995 & Supp. 1997).

121. *Berrios*, 501 F.2d at 1209. In support of Berrios' allegation, his counsel submitted an affidavit averring that there have been only three Section 504 prosecutions since 1969, and that President Nixon and his brother were in some way connected with the Marriott Restaurant Chain's officers. *Id.* at 1209-10.

122. *Id.* at 1210.

123. *Id.* Berrios moved the district court to order the Government to produce a letter from the prosecutor to his superiors seeking authorization to prosecute Berrios. *Id.* at 1210.

124. *Id.* at 1210-11.

125. *Id.* at 1210.

126. *Berrios*, 501 F.2d at 1210.

127. *Id.* at 1211-12.

128. *Id.* at 1211 (citing United States v. Berrigan, 482 F.2d 171, 177, 181 (3rd Cir. 1973)). The court found that Berrios had not shown a single violation for which he was

the district court to determine the relevant material for establishing Berrios' selective prosecution claim.[129]

Finally, in *United States v. Wayte*,[130] the United States Supreme Court definitively closed the door on drawing inferences of discriminatory intent from discriminatory effect in selective prosecution cases. In *Wayte*, the defendant was one of a few persons prosecuted for refusing to register with the Selective Service.[131] In his defense, Wayte asserted a claim of selective prosecution, alleging that the Government targeted him because of his "vocal" opposition to the registration requirement.[132]

After stating that the standards for selective prosecution are the general equal protection standards of discriminatory effect and discriminatory purpose, the United States Supreme Court held that Wayte failed to proffer evidence showing the existence of either of the two.[133] As to the first element, the Court found that Wayte did not show the Government prosecuted any of the defendants on the basis of their speech.[134] As to the second element, the Court found that the Government's mere awareness that there would be "vocal offenders" raising a claim of selective prosecution if criminally charged did not mean that the Government intended to prosecute those particular offenders.[135] In con-

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prosecuted that had been committed by others who were not prosecuted, even though, as the court believed, evidence of this element was not in the exclusive possession of the Government. *Berrios*, 501 F.2d at 1211-12.

129. *Id.* at 1212-13. The appellate court held the district court did not abuse its discretion by ordering the Government to produce the letter to the court, but abused its discretion by ordering the Government to release the letter, or any portion thereof, that was not confidential to the defendant. *Id.* at 1212.

130. 105 S. Ct. 1524 (1985).

131. *Wayte*, 105 S. Ct. at 1528. After a Presidential Proclamation requiring the defendant and others similarly situated to register, Wayte, as a manner of protest, sent a letter to the Government expressing his intent not to register. *Id.* at 1527-28. After additional correspondence with the Government, the Government filed charges against Wayte. *Id.*

132. *Id.* at 1528-29. The Court clarified the term "vocal opponent," stating it was not limited to persons who publicly stated their opposition to the registration, but merely to anyone expressly stating they would not register. *Id.* at 1529 n.6. Wayte submitted evidence that an estimated six hundred and seventy-four thousand other offenders were not prosecuted, while all thirteen offenders prosecuted at the time this case was before the district court had been vocal offenders. *Id.* at 1529.

133. *Id.* at 1531-32.

134. *Id.* The Government did not prosecute those who spoke against registration with Selective Service as long as they did not report themselves or were not reported by others. *Id.* The Government did, however, prosecute those who reported themselves or were reported by others but did not publicly protest. *Id.* For the Supreme Court, this was sufficient evidence to show that the Government treated all the reported nonregistrants in the same manner. *Id.*

135. *Id.* at 1532. Discriminatory intent implies that the Government is prosecuting the particular defendant *because of*, and not merely *in spite of*, his or her belonging to a particular class. *Id.* (emphasis added).

clusion, therefore, the Court held David Wayte did not demonstrate that his prosecution was motivated by his vocal opposition to registration.[136]

The dissent in *Wayte*, lead by Justice Marshall, objected to the majority's holding for two principal reasons.[137] First, the dissent did not agree with the majority as to the elements of selective prosecution.[138] Second, the dissent opined that the defendant had shown a colorable basis to be entitled to further discovery of government materials proving the elements of selective prosecution.[139] The dissent cited the case of *Castaneda v. Partida*[140] as listing the standards for proving selective prosecution.[141] The elements as propounded by *Castaneda* are that: (1) the defendant is a member of a recognizable, distinct class; (2) a disproportionate number of this class was selected for investigation and possible prosecution; and (3) this selection procedure was subject to abuse or otherwise not neutral.[142]

The dissent opined that the Court should not have disposed of the selective prosecution claim on the merits.[143] Rather, the Court should have decided whether Wayte was entitled to discovery of Government documents and whether the district court abused its discretion in allowing such discovery.[144] Justice Marshall, writing in dissent, stated that to obtain discovery, the defendant did not need to show a prima facie case of selective prosecution but rather merely that his claim was not frivolous.[145] Justice Marshall then stated that Wayte had made such a non-frivolous showing, or had at least provided a "colorable basis" sufficient to entitle him to further discovery of evidence proving his claim.[146]

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136. *Wayte*, 105 S. Ct. at 1532.

137. *Id.* at 1534-43. The dissent in *Wayte* thought that Wayte's right to discovery was the main issue before the Supreme Court, while the majority decided Wayte's selective prosecution claim on the merits. *Id.* at 1534, 1539. The dissenting opinion in *Wayte* was accepted by many courts as the rule for obtaining discovery in selective prosecution cases. *Developments in the Law - Race and the Criminal Process,* 101 HARV. L. REV. 1520, 1557 n.99 (1988). *See* United States v. Gordon, 817 F.2d 1538, 1540 (11th Cir. 1987), *vacated on other grounds,* 836 F.2d 1312 (11th Cir. 1988). This, however, was apparently not accepted by the Court in *Armstrong*. *Armstrong,* 116 S. Ct. at 1488-89.

138. *Wayte*, 105 S. Ct. at 1540-42.

139. *Id.* at 1540-42.

140. 97 S. Ct. 1272, 1280 (1977).

141. *Wayte,* 105 S. Ct. at 1540.

142. *Id.* (citing *Castaneda*, 97 S. Ct. at 1280).

143. *Id.* at 1534.

144. *Id.* at 1539.

145. *Id.* at 1540.

146. *Wayte*, 105 S. Ct. at 1542. The dissent argued that under the *Castaneda* standards, Wayte had clearly shown to be a member of a distinct class of "vocal opponents" of registration. *Id.* at 1540. Further, there was evidence that the Government knew and

The development of selective prosecution illustrates that the requirements for proving such a claim have steadily increased. More than two decades ago, a defendant could prove a selective prosecution claim by evidence of disparate impact upon which an inference of discriminatory intent could be drawn.[147] The effect of such evidence was to shift the burden of proof to the Government to rebut the inference of invidious discrimination.[148] After *Armstrong*, however, courts will no longer accept proof of discriminatory effect to infer discriminatory intent.[149] A defendant bringing a selective prosecution claim must present credible evidence showing different treatment of similarly situated persons to be entitled to discover evidence establishing that claim.[150]

In *Armstrong*, the Supreme Court appeared prepared to accept statistical evidence tending to show discriminatory impact in order to grant discovery, but the evidence had to be more credible and sophisticated in nature than the evidence presented by the defendants.[151] In addition, by limiting its holding to the standard for obtaining discovery as to the element of discriminatory effect, the *Armstrong* Court left open the issue of what the standard for obtaining discovery is with respect to the element of discriminatory purpose.[152] This limited holding may impose further difficulties upon defendants seeking to obtain discovery to establish a claim of selective prosecution. Even if a defendant presents sufficient evidence to obtain discovery for discriminatory impact, it may be of no avail unless an independent threshold showing of discriminatory intent is made. Even when compelled to produce evidence of discriminatory impact, the Government might be able to object to disclosing evidence of discriminatory intent on formal grounds.

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consciously targeted the offenders who reported themselves, or were reported by others, thereby making the claim at least "nonfrivolous" and warranting further discovery of Government documents. *Id.* at 1540-41. As to whether the selection procedure was subject to abuse, the dissent stated that the decision to apply the "passive" enforcement scheme was certainly subject to abuse. *Id.* at 1541-42. The correlation between those who expressed their view on the registration and those who were prosecuted made it susceptible to punishing free expression under the color of law enforcement. *Id.*

147. *Crowthers*, 456 F.2d at 1078; *Steel*, 461 F.2d at 1152; *Falk*, 479 F.2d at 621.

148. *Crowthers*, 456 F.2d at 1078; *Steel*, 461 F.2d at 1152; *Falk*, 479 F.2d at 621.

149. *Armstrong*, 116 S. Ct. at 1488-89.

150. *Id.* at 1489.

151. *Id.* The Court noted that the "study" presented by the defendants in support of their claim of selective prosecution did not identify persons of a different race who were known to federal enforcement officers and who could have been charged with the same offenses the respondents have been charged, but were not. *Id.*

152. *Id.* at 1488. The Court in *Armstrong* stated that "in this case [it] consider[ed] what evidence constitutes 'some evidence tending to show the existence' of the discriminatory effect element," indicating a limited holding. *Id.*

Justice Stevens' dissent in *Armstrong* raises at least two significant questions in response to the majority's opinion.[153] First, did the district court judge abuse its power in ordering the Government to produce evidence sought by the defendants in support of their claim of selective prosecution?[154] Second, what was the meaning of the sentencing statistics relied on by the majority?[155] As to the first question, Justice Stevens indicated that the Court neglected to apply the proper standard of review against the district court judge's decision to order discovery of Government evidence, and failed to take into account the trial court's inherent powers to do so.[156] The Court, however, seemed intent on setting the threshold showing necessary for obtaining discovery in selective prosecution claims and resolving an apparent conflict between the circuits rather than reviewing the trial court's decision.

As to the second question, the dissent pointed out that the proper comparison of similarly situated persons would be the racial distribution of persons who committed crimes involving crack cocaine and the racial distribution of persons actually prosecuted for these offenses.[157] The percentage of convicted offenders, however, seemed to support rather than refute the defendants' claim of selective prosecution.[158] It would be more helpful for the courts to have statistical information and reports gathered and prepared by the Government regarding the profile of persons that have committed, or are suspected of committing, the particular crime in question. This type of information was precisely, in part, the information that the district court in *Armstrong* ordered the Government to produce.[159]

The Court also could have resolved the case by compelling discovery of Government evidence in accord with how this was done

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153. *Armstrong*, 116 S. Ct. at 1492-95.

154. *Id.* at 1492.

155. *Id.* at 1494.

156. *Id.* at 1492, 1494-95. The dissent found that under the proper standard of review, abuse of discretion, the district judge did not abuse its discretion in ordering discovery. *Id.* The circuit courts have often afforded greater deference to a trial court's decision to order discovery by applying the abuse of discretion standard. *See, e.g., Berrios*, 501 F.2d at 1212.

157. *Armstrong*, 116 S. Ct. at 1494-95. The majority recited reports of the Sentencing Commission stating how many persons were sentenced for particular federal crimes. *Id.* at 1488-89.

158. *Id.* at 1494.

159. *Id.* at 1484. The district court ordered the Government: (1) to provide a list of all cases from the last three years in which the Government charged both cocaine and firearms offenses; (2) to identify the race of the defendants in those cases; (3) to identify what levels of law enforcement were involved in investigating those cases; and (4) to explain its criteria for deciding to prosecute those defendants for federal cocaine offenses. *Id.*

by the court in *Berrios*. Specifically, the Court could have determined what evidence would have illuminated whether the Government engaged in selective prosecution, and distinguished this evidence from information serving merely to expose the Government's prosecutorial strategy.[160]

After *Armstrong*, determining when defendants asserting a claim of selective prosecution have shown sufficient evidence to warrant a discovery order is difficult. The Supreme Court has indicated that although equal protection under the Fifth and Fourteenth Amendments deserves judicial protection, determining how much the judiciary may interfere with the executive branch by inquiring into the Government's prosecutorial decisions is equally important. In *Armstrong*, the principle of judicial deference to broad prosecutorial discretion carried the day.[161] The Court's decision seems to allow more prosecutorial discretion without exposing the prosecutor to the high scrutiny that the authority of such a function demands. Unfortunately, an excessive measure of discretion might, if not checked, produce abuse in the area of equal protection, and the Court may soon find itself resolving the same issue once again.

Zoran Stojanovic

160. *See Berrios*, 501 F.2d at 1212.
161. *See generally Armstrong*, 116 S. Ct. at 1486.